APPENDIX A

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF NEW YORK

Civil No. 11,560

UNITED STATES OF AMERICA *ex rel.* JACOB MOLINAS,

Relator,

—against—

ALBERT J. MEYER, as Acting Warden of Attica State Prison, Attica, State of New York,

Respondent.

Thomas R. Newman, New York City,
Attorney for Petitioner

Joseph J. Ricotta, Assistant Attorney General of New York; Frank S. Hogan, District Attorney of New York County, H. Richard Uviller and Alan F. Leibowitz, Assistant District Attorneys, of counsel

FINDINGS OF FACT

1. The petitioner is held on a judgment of the Supreme Court, New York County, entered February 11, 1963 following a jury verdict of guilty of crimes of conspiracy, three counts of bribery, and one count of attempted subornation of perjury. He was sentenced to an aggregate term of 10 to 15 years. On November 9, 1964 the court

modified the sentence by revoking the sentence imposed on Count 4 of the indictment and re-sentenced him nunc pro tunc to a term of 2 to 5 years on said count, which resentence was to run consecutively to the 5 to 7½ year sentences imposed on Counts 2 and 3. Thus modified, the petitioner must serve an aggregate of 7 to 12½ years.

2. The judgment was affirmed by the Appellate Division, 21 A. D. 2d 384. The Court of Appeals denied permission to appeal to that court. A petition for reargument was denied by the Appellate Division. The Supreme Court of the United States denied certiorari.

3. The petitioner claims that the judgment of conviction and sentence was obtained in violation of his rights under the Federal Constitution. Particularly he claims: (1) by the admission into evidence of incriminating statements elicited from him by means of a recording device concealed on the person of an accomplice pursuant to arrangement made with the prosecutor's office after petitioner had become a prime suspect of the prosecutor's investigation, in the absence of counsel and without prior warning of his constitutional right to remain silent, and not being even aware that he was under investigation; (2) he was deprived of a fair trial by the denial of his motion for a mistrial, and by the interruption of his trial after a four and one-half week interruption caused by the illness of the trial judge.

4. By order of this court dated September 21, 1965, the respondent was directed to show cause why a writ of habeas corpus should not issue, and to produce before this court for its examination the record of the proceed-

ings at the trial and the briefs of the respective parties in the Appellate Division. The presence of the petitioner was not required on the return of this order to show cause. Pursuant to that order the papers ordered to be produced have been produced, and are sufficient for this court to determine the questions presented. There is no need for a further hearing.

5. The petitioner was an All-American basketball player at Columbia University and a professional player in the National Basketball Association. He was also an attorney admitted to practice in New York. Over a period of four years, from 1957 to 1961, Molinas and his three partners, Wagman, Hacken and Green, entered into a conspiracy to control the outcome of college basketball games throughout the country.

6. One of the college basketball players bribed by Molinas was Reed, a player at Bowling Green University in Ohio. When the authorities began to uncover the details of the conspiracy, Molinas took steps to conceal his complicity and in March, 1961 he began to secure the cooperation of Reed to avert his arrest. Over the following months Molinas made two trips to Ohio to speak to Reed in person as well as maintain contact with him by telephone. Molinas instructed Reed to reveal nothing, but if called before the grand jury, to lie about the crimes. Molinas also told Reed to retain counsel and had Reed write a letter to him (Molinas) asking Molinas to serve as Reed's attorney. Reed wrote the letter as Molinas dictated it. In January, 1962 Reed was brought to New York to appear before the grand jury, and again Molinas instructed him to deny he had ever received money to fix games, from

Molinas. Reed, however, after consulting with Legal Aid attorneys, decided to cooperate with the district attorney and agreed to carry a recording device on his person. Reed then telephoned to Molinas and was asked to come to Molinas' law office. There Reed recorded a conversation in which Molinas instructed him how to lie to the grand jury without risking exposure, and Molinas further briefed him on the specific facts that Reed was to deny or not to remember. This recorded conversation took place on January 16, 1962.

7. The indictment was returned on May 15, 1962. Molinas was not under arrest when the incriminating statements complained of were made. Since Molinas was not under arrest, the prosecuting authorities were free to question him either directly or they could use an agent such as Reed.

8. Merely because Molinas was under suspicion for the crime of conspiracy he was not entitled to a lawyer when being questioned in the investigation of the crime. The failure to provide him with one, or to warn him of his right to counsel, did not render the statements made by him inadmissible in evidence. The instructions given by Molinas to Reed in themselves constituted the crime of attempted subornation of perjury.

9. The interval in the trial, occasioned by the illness of the trial judge, did not entitle the relator to a mistrial. On Friday, November 30, 1962, after five weeks of trial amounting to 2907 pages of the trial record, the court recessed until the following Monday. Over the weekend the judge was stricken with a kidney stone attack and his

hospitalization prevented the resumption of the trial for four and one-half weeks, until Wednesday, January 2, 1963. During this interval the trial was adjourned several times, although the jury was not reconvened for these motions. The intermission occurred during the defendant's presentation, a day and a half after the close of the People's case. Following the resumption one day was required to complete the testimony, the defendant putting one witness on the stand, the People countered with one rebuttal witness. Both sides then rested. Upon resumption of the case, the trial judge gave the jury appropriate instructions so as to allow the jurors to refresh their recollections. The defense was permitted to read to the jury any portion of the record which it was felt was necessary to recall. The jurors themselves were told they could have any testimony reread. The recapitulation of the testimony during both summations and in the court's marshaling of the evidence provided ample means to recall the evidence to the jury. There was no showing of prejudice by the interruption of the trial. The trial judge's denial of the motion for a mistrial, based upon the interruption of the trial, was a discretionary matter within the trial judge's jurisdiction. It should be given great weight in this proceeding.

Conclusions of Law

1. Incriminating statements made by Molinas while attempting to suborn perjury were properly admitted into evidence.

2. The incriminating statements made by Molinas as secured by the tape recording device and its admission into evidence did not infringe the petitioner's rights under the Federal Constitution.

3. The interval in the trial occasioned by the illness of the trial judge did not entitle Molinas to a mistrial. The denial of the motion for mistrial was not an infringement of the rights of Molinas under the Federal Constitution and did not amount to the denial of a fair trial.

4. The judgment of conviction and sentence under attack in this proceeding is a valid and legal judgment and was not procured in violation of the petitioner's rights under the Federal Constitution.

Petitioner's application for a writ of habeas corpus should be, and the same hereby is, denied upon the merits. It is hereby so ordered.

Certificate of probable cause is denied.

Permission to appeal in forma pauperis is also denied with the qualification that the petitioner may file with the Clerk of the United States District Court, United States Court House, Buffalo, N. Y., a notice of appeal without the payment of filing fees.

This denial does not prevent the petitioner from applying directly to the Court of Appeals for the Second Circuit, United States Court House, Foley Square, New York City, for a certificate of probable cause and for permission to prosecute an appeal in forma pauperis.

HAROLD P. BURKE
U. S. District Judge

March 7, 1966.

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF NEW YORK

Civil No. 11,560

[SAME TITLE]

Thomas R. Newman, New York City,
Attorney for Petitioner

Joseph J. Ricotta, Assistant Attorney General of New York; Frank S. Hogan, District Attorney of New York County, H. Richard Uviller and Alan F. Leibowitz, Assistant District Attorneys, of counsel

On re-consideration, I hereby certify that there is probable cause for appeal.

HAROLD P. BURKE
U. S. District Judge

March 15, 1966.

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 202—September Term, 1966.

(Argued November 28, 1966 Decided January 5, 1967.)

Docket No. 30554

UNITED STATES OF AMERICA *ex rel.* JACOB MOLINAS,

Petitioner-Appellant,

—v.—

VINCENT R. MANCUSI (successor to Albert J. Meyer), Warden of Attica State Prison, Attica, New York,

Respondent-Appellee.

Before:

FRIENDLY, SMITH and ANDERSON,

Circuit Judges.

Appeal from the denial of an application for a writ of habeas corpus in the United States District Court for the Western District of New York, Harold P. Burke, *Chief Judge.*

Affirmed.

THOMAS R. NEWMAN, New York, N. Y., *for petitioner-appellant.*

MICHAEL H. RAUCH, Asst. Attorney General of the State of New York (Louis J. Lefkowitz, Attorney General and Samuel A. Hirshowitz, First Asst. Attorney General, on the brief), *for respondent-appellee.*

SMITH, *Circuit Judge*:

Jacob Molinas appeals from an order of the United States District Court for the Western District of New York, Harold P. Burke, *Chief Judge*, which denied his application for a writ of habeas corpus. Appellant is currently serving a seven to twelve and one-half year sentence in the Attica State Prison after conviction in the Supreme Court of the State of New York for New York County for conspiracy, bribery and attempted subornation of perjury. His petition alleged that the admission of a certain tape recording in his trial violated his Fourth, Fifth and Sixth Amendment rights and that a four and one-half week adjournment of his trial because of illness of the judge after five weeks of trial denied him due process as guaranteed by the Fourteenth Amendment. Finding no merit in appellant's appeal, we affirm the denial of the writ.

From 1957 to 1961, Molinas, a former college and professional basketball player and a member of the New York Bar, conspired with three associates and college players to control the scores of intercollegiate basketball games across the country. One of his co-conspirators was Dennis William Reed, a college player who had accepted bribes. In March of 1961 Molinas telephoned Reed that something was brewing but not to worry. After telephoning Reed in May 1961

Molinas went to Ohio to talk with Reed, told him of a grand jury investigation and advised him how to lie to the grand jury if called. That summer Molinas again visited Reed, then at summer school in Ohio, recommended that Reed retain Molinas as counsel and dictated a letter which Reed wrote and gave to Molinas asking Molinas to act as Reed's counsel. After a New York investigator interviewed Reed in Ohio, Reed telephoned Molinas that Reed was coming to New York to testify before the grand jury. Molinas met Reed, and had him sign another letter retaining Molinas as counsel and a paper purporting to exculpate Molinas. Molinas accompanied Reed to the District Attorney's office and to a court appearance where a judge ruled that it would be unethical for Molinas to represent Reed. Thereafter, although initially refusing to do so, Reed agreed to cooperate with the authorities. After receiving a grant of immunity, he made an appointment to see Molinas and subsequently went to the latter's office equipped with a concealed tape recorder. Purporting to seek legal advice, Reed elicited statements from Molinas about the conspiracy and the bribery, and during this session appellant attempted to suborn Reed's testimony before the grand jury. At Molinas' trial Reed related the substance of these statements; corroboration of his accomplice testimony which is necessitated by N. Y. Code of Crim. P. §399 was effected by playing the tape recording.

The government contends that appellant is barred from raising his Fourth Amendment claim because it was not passed on by the New York courts. At trial, defense counsel objected that admission of the tape recording "would constitute a violation of the defendant's constitutional rights under the United States Constitution." This broad phrasing adequately preserved appellant's rights under

New York law. See *People* v. *O'Neill*, 11 N. Y. 2d 148, 227 N. Y. S. 2d 416 (1962). However, on appeal to the Appellate Division, on application for leave to appeal to the Court of Appeals, on reargument of that application and on motion to reargue in the Appellate Division, appellant did not present his Fourth Amendment claim. It was first specifically asserted in his petition for certiorari to the United States Supreme Court. Hence, although on trial appellant preserved the Fourth Amendment claim for review, he did not pursue it through the appellate process. Therefore, the claim was not passed on by the appellate courts of New York and is not properly presented here. *Fay* v. *Noia*, 372 U. S. 391, 438-39 (1963). In any case, it is without merit. In *Lopez* v. *United States*, 373 U. S. 427 (1963), the Court upheld, over Fourth Amendment objections, the admissibility of a tape recording obtained by a government agent who purported to follow up previous bribes and, like Reed, carried a hidden tape recorder, was voluntarily admitted to the suspect's office and guided the conversation toward incriminatory remarks. See also *Z. T. Osborn, Jr.* v. *United States*, —— U. S. —— (slip op. Dec. 12, 1966); *United States* v. *Pardo-Bolland*, 348 F. 2d 316 (2d Cir. 1965), cert. denied 382 U. S. 944, 946 (1966); *United States* v. *Kabot*, 295 F. 2d 848 (2d Cir. 1961), cert. denied 369 U. S. 803 (1962). The distinction that the recording in *Lopez* was strategically useful to substantiate the agent's credibility and the recording here also was legally necessary to corroborate the accomplice testimony is immaterial. The attempted distinction that Lopez knew he was speaking to a federal officer whereas Molinas merely thought he was speaking to a co-conspirator is also without merit, for in *Osborn* v. *United States, supra*, Osborn likewise had no knowledge that Vick, who visited his office

with the concealed recorder, had at the time any connection with the federal authorities.

Unlike the Fourth Amendment argument, the Fifth and Sixth Amendment claims were passed on by the New York appellate courts, for, the claims were presented on application for leave to appeal to the Court of Appeals and on motion to reargue in the Appellate Division. Regarding the merits of his Fifth and Sixth Amendment claims, appellant apparently recognizes that any direct reliance on *Escobedo* v. *Illinois,* 378 U. S. 478 (1964) and *Miranda* v. *Arizona,* 384 U. S. 436 (1966) is misplaced because his trial started in 1962 and *Johnson* v. *New Jersey,* 384 U. S. 719 (1966), held that *Escobedo* and *Miranda* apply only to trials commenced after June 22, 1964 and June 13, 1966 respectively, the dates of those decisions. Hence, appellant relies not on the holdings of *Escobedo* and *Miranda* but rather on their supposed radiations and asks that their principles be applied to a suspect who is not in custody. Such an extension of *Escobedo* and *Miranda* is unwarranted. Appellant also attempts to draw support from *Massiah* v. *United States,* 377 U. S. 201 (1964); however, Massiah had been indicted. Although the state may have had sufficient evidence to indict Molinas, that is immaterial. Compare Mr. Justice Stewart's statement for the Court in *Hoffa* v. *United States,* —— U. S. ——, Dec. 12, 1966, slip op. p. 17, "There is no constitutional right to be arrested." While the Supreme Court recognized in *Miranda* that the self-incrimination clause of the Fifth Amendment protects only against compelled testimony, it presumed that all in custody interrogation involves elements of compulsion. Such a presumption cannot cover something said by a lawyer in the quiet of his own office. Cf. *United States* v. *Bottone,* 365 F. 2d 389, 395 (2d Cir.), cert. denied —— U. S. —— (1966). More-

over, this was no case of Molinas' testifying against himself; what he said was a crime itself. Also, it may be noted that the *Massiah* decision was handed down May 18, 1964 and because it involved issues similar to those in *Escobedo* and *Miranda* the *Johnson* date of decision rule may be expected to apply. Prior to *Johnson,* this court ruled that *Massiah* is not retroactive. *United States ex rel. Romano* v. *Fay,* 360 F. 2d 389 (2d Cir. 1966).

Appellant finally contends that the four and one-half week adjournment after five weeks of his trial which was caused by the trial judge's kidney stone attack and subsequent recuperation violated his right to due process under the Fourteenth Amendment. This contention must fall because appellant had not established that the adjournment was prejudicial. He has not shown that the jurors had difficulty recalling testimony or had forgotten their impression of the witnesses' credibility. In fact, the judge made available his copy of the minutes, granted the defense additional summation time, allowed it to read from the record and marshalled the evidence. Moreover, on several occasions the jury accepted the judge's offer to have portions of the record read. Appellant has not proved that either improper contact with the jury or unauthorized discussion of the case occurred.

The judgment denying petitioner's application for a writ of habeas corpus is affirmed.